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In the Supreme Court

of the United States

OCTOBER TERM, 1968

CASE NO. 1038

UNITED MEDICAL LABORATORIES, INC., an Oregon corporation,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., a New York corporation, WALTER CRONKITE and JAY McMULLEN,

Respondents.

PETITION FOR CERTIORARI

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the District of Oregon.

OPINIONS BELOW

The opinion of the United States District Court is reported at 258 F. Supp. 735 (1966) and is printed in Appendix A hereto, infra page 13.

The opinion of the United States Court of Appeals is reported at — F.2d — (1968) and is printed in Appendix B hereto, infra page 37.

JURISDICTION

The judgment of the United States Court of Appeals of the Ninth Circuit was entered and filed on the 18th day of November, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Was the Court of Appeals in error in extending the privilege applied in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) to the publications involved herein solely on the ground that they involved matters of *public interest?*

2. Should not the rule of the *New York Times* case be limited in extension to situations involving

a. matters of public interest, and

b. public figures, or

c. persons with a practical ability to counter-argue or respond considering the mode of the publication involved?

CONSTITUTIONAL PROVISIONS INVOLVED

1. U. S. Const., Amendment I.

Freedom of religion, speech, and press; right to assemble and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances. U.S.C., Const., Amend. I.

2. U. S. Const., Amendment XIV, § 1.

Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C., Const., Amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner brought this action against respondents in the United States District Court for the District of Oregon based upon diversity of citizenship (28 U.S.C. § 1332). Petitioner alleged that respondents defamed it by means of two national television broadcasts, two national radio broadcasts and two news releases concerning these broadcasts and that petitioner sustained substantial damages as a result thereof (R. pp. 1-17).

Respondents moved to dismiss the complaint claiming that it failed to state any claim for relief (R. pp. 25, 26). Affidavits were submitted by the parties supporting and opposing the motion (R. pp. 44-73, 133-157, 180-184, 230-242, 272-274). The District Court granted respondents' motion and dismissed this action on the basis that under the record petitioner had no claim for relief under Oregon law as a matter of law (R. pp. 249-268, App. A).

The Court of Appeals held that the District Court was in error and that the record established, under Oregon law, a case of defamation against petitioner sufficient to go beyond a summary judgment. The Court of Appeals affirmed the judgment of the District Court, however, upon another ground. It held that the constitutional privilege set forth in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) was applicable to the facts herein and that, even though the statements

were defamatory under Oregon law, this federal rule foreclosed this action due to the privilege (App. B).

Petitioner operates a clinical testing laboratory which is located in Portland, Oregon and conducts its business almost exclusively through the use of the mails (R. pp. 137-139, 272).

On June 22 and 23, 1965 respondents broadcast nationally an expose of so-called "mail order labs" which they contended was based upon a five-month investigation by a "CBS Fact Finding Unit" (R. pp. 78-86, 91-96, 100-104). The broadcasts were made nationally on the CBS Television Network during the program "CBS Evening News with Walter Cronkite" (6:30-7:00 P.M., EDT, in some areas; 7:00-7:30 P.M., EDT, in others) (R. pp. 91-96, 100-104), and they were made on the CBS Radio Network during the program "The World Tonight" (8:00-8:15 P.M. EDT) (R. pp. 78-81, 82-86). Respondents also issued press releases containing the substance of these broadcasts (R. pp. 87-90, 97-99).

On these programs respondents raised serious questions as to whether certain tests, which petitioner performs, can be done accurately when the sample is received by mail. Respondents claimed that they set up an experiment to test the point by submitting 6 specific tests to 17 unnamed "mail order labs." Respondents claim the results reported were grossly in error and that patients' lives could be endangered as a result. Petitioner alleged that persons seeing and hearing these programs believed them to be refering to it (R. pp. 133-136).

Prior to the programs and in October, 1964, CBS News contacted the State Board of Health in Oregon to obtain the names of all Oregon clinical laboratories doing interstate business by mail (R. pp. 140, 142). It learned that petitioner was the only such laboratory in Oregon (R. p. 143). Respondents did not, however, submit any samples to petitioner as part of their experiment (R. p. 88).

On June 23, 1965, before the second broadcasts, petitioner demanded that respondents cease such broadcasts and retract the false statements (R. pp. 5, 6). Also, on June 23, 1965 respondents broadcast on the second program that a third program would be presented the following night on which an industry spokesman would be allowed to respond, and they contacted petitioner to obtain a video tape interview and movies of its facilities (R. pp. 104, 135, 180, 181). On June 24, 1965 such an interview and movies were made and sent by airplane to CBS News in Los Angeles that morning. The tapes and movies were not broadcast by respondents, however, on the June 24, 1965 program or thereafter (R. pp. 105-111, 136) (App. A. p. 14).

ARGUMENT

Either the Court of Appeals has decided a federal question in a way in conflict with decisions of this Court and the Fifth Circuit, or it has decided an important question of federal law which has not been, but should be, settled by this Court.

In this case the Court of Appeals has used the *New York Times* rule to insulate a TV and Radio

Network from the consequence of defamatory statements and to deny petitioner redress for the damage it received therefrom. The consquences of the decision are far greater, however. The court has extended the *New York Times* rule to areas where neither *public officials* nor *public figures* are involved on the theory that the defamatory matter need only concern a matter of *public interest* to be within the sanctions of the First Amendment immunity.

This extension is far beyond the previous decisions of this Court and seems in conflict with the recent decision of *Belli* v. *Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1967), which applied this Court's decision in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). It eliminates any consideration of the person spoken of in complete deference to the subject matter of the statement. This extension necessarily means that any private individual can be barred from a legitimate cause of action by the privilege applied in the *New York Times* case. The defamer is given complete control over his own immunity, for it is his statement, no matter how false it may be, that determines whether public interest is involved.

By this decision the Ninth Circuit has, therefore, in effect destroyed any cause of action for defamation where malicious or recklessly wanton conduct cannot be proven. The First and Fourteenth Amendments do not justify the elimination of this cause of action merely because a matter of public interest

might be present. Freedom of speech is not without limitation. For example, it does not authorize one to cry "fire" in a public place, even though such a fire is of public interest. *Schenck* v. *United States*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919). This Court in the *New York Times* case applied the First Amendment solely to protect the free interchange of political discussion. In *Curtis Publishing Co.* v. *Butts*, supra 338 U.S. at 148, 87 S. Ct. at 1988, and *Time, Inc.* v. *Hill*, 385 U.S. 374, 390, 87 S. Ct. 534, 543, 17 L. Ed. 2d 456 (1967), however, this Court warned against "blind application of *New York Times Co.* v. *Sullivan*" and suggested considering "the factors which arise in the particular context."

This Court has clearly explained that by the *New York Times* rule it was invoking "the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest government policies. *Curtis Publishing Co.* v. *Butts*, supra 388 U.S. at 153, 87 S. Ct. at 1990. This Court then extended the rule to public figures such as Mr. Butts and Gen. Walker since:

> ". . . both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and falacies' of the defamatory statements." 388 U.S. at 155, 87 S. Ct. at 1991.

This Court in the *Butts* case also relied upon the rule in libel cases which investigates "the plaintiff's position to determine whether he has a legitimate

call upon the court for protection in light of his prior activities and means of self defense." 388 U.S. at 154, 87 S. Ct. at 1991.

The court below completely disregarded the necessity of these factors and gave no consideration at all to the fact that plaintiff did not thrust itself into the arena of debate as a public figure or to plaintiff's inability to adequately defend itself under the circumstances of this attack. The court actually disregarded what it called the "limelight" factor altogether (App. B., p. 49). The Fifth Circuit Court of Appeals, on the other hand, in *Belli* v. *Orlando Newspapers, Inc.*, supra, at 389 F.2d 587-588, did interpret this Court's decisions as requiring proof of these factors.[1]

An examination of the "factors" in the particular context" of the instant case clearly establishes that the reasons for the application of the *New York Times* rule do not exist. The factors in the instant case are as follows:

1. Petitioner is not a public official or a public figure. It is not a movie star, football coach or government critic. It in no way entered a debate or discussion concerning the reliability of testing samples

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[1] See also the recent case of *Time, Inc. dba "Life"* v. *McLaney*, — F.2d —, (5 Cir. Jan. 3, 1969, No. 25585). Although the court there agreed with the Ninth Circuit that the *New York Times* rule was open to further definition, it extended the privilege to the plaintiff because he injected himself into an election campaign and thrust "his personality into the 'vortex' of an important public controversy."

received by mail. It did not, nor does it now, advertise its services to the public. Except among its doctor accounts, the medical community and its own employees and suppliers, it was not even known to the public prior to respondents' broadcasts.

2. The mode and degree of publication involved in this case must be considered in determining the ability of one to counterargue or self-defend. The statements defaming petitioner were broadcast by respondents nationally on television during prime time and on CBS's nationally advertised premier news program. Additionally the statements were broadcast nationally by radio and released to the wire services and newspapers by special news releases. While this Court has not specifically examined the mode of publication as a relevant factor in applying the *New York Times* rule, the use of national television as herein dictates that the mode of publication is a factor that must be considered.[2] Using national television as their media with the radio and press releases as backups, respondents have caused their message to reach, with maximum impact, the maximum possible number of people in the United States.

3. Considering petitioner and the mode of publication, the test of *Curtis Publishing* v. *Butts* cannot

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[2] See O'Neil, Television, Tort Law and Federalism, 53 Cal. L. Rev. 421, 440-441 (1965) where the author points out:

> "And whatever could be said of radio, it was even more true of television, for studies have shown how much greater is the impact of a particular communication when received through the senses of sight and sound simultaneously than through sound alone."

be met. Petitioner is not in a position to command any, much less continuing, public interest, and petitioner does not have sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of respondents' defamatory statements. Petitioner cannot demand "equal time" as a politician might. In June of 1965 CBS sold prime national television time between 6:00 and 11:00 P.M. for about $60,000 per quarter hour.[3] The portions of CBS Evening News with Walter Cronkite devoted to this expose were about 15 minutes per broadcast for three days. Thus, assuming that CBS would sell petitioner such prime time and without regard to production costs, petitioner would have to pay nearly $180,000 just to appear on television alone for the same amount of time at comparable hours. Therefore, when respondents refused to allow petitioner to respond and refused to retract, petitioner was from a practical standpoint devoid of any ability to self-defend. One cannot even write a letter to the editor in the case of television or radio broadcasts.

It is very apparent from this examination that anyone who is not a public figure or public official would be placed in the same dilemma as petitioner. If the rule of the Ninth Circuit is allowed to stand, publication media may defame private persons with no ability to respond so long as a subject of public

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[3] See CBS rates for television time in "Network Rates and Data" June 10, 1965, published by Standard Rate and Data Service, Inc.

interest is chosen by the media as a mode of attack. An attack by the means employed herein would literally ruin any private individual. This decision is contrary to the reasoning of this Court, it is contrary to any principle of justice and it must be reversed before it results in indiscriminate damage to other private persons.

This Court should reverse the lower court's decision as an improper application of the *New York Times* rule. Any confusion, which the Ninth Circuit's decision apparently reflects, to the effect that only a matter of public interest need be involved to make defamatory statements privileged, must be stopped. A definite line should be drawn which requires consideration of the ability of the defamed person to respond before the *New York Times* rule can be applied.

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED MEDICAL LABORATORIES, INC., an Oregon corporation,

Plaintiff,

v.

COLUMBIA BROADCASTING SYSTEM, INC., a New York corporation, WALTER CRONKITE, JAY McMULLEN, MORRIS SCHAEFFER, and VICTOR BUHLER,

Defendants.

CIVIL OPINION No. 65-318

KILKENNY, DISTRICT JUDGE:

Plaintiff charges the defendants with maliciously publishing false and defamatory statements related to plaintiff by means of radio, television and the press. Substantial special, compensatory and punitive damages are claimed. Previously, the Court quashed the service of process on defendants Morris Schaeffer and Victor Buhler. *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc. et al*, — F. Supp. (D. Or. 1966).

The cause is before the Court on the motion of the remaining defendants to dismiss.

All of the broadcast material is before the Court and in the course of the hearing on the motion to dismiss, the Court actually viewed the telecasts. The parties have indicated that all relevant and material matters with reference to plaintiff's claim are now before the Court.

Plaintiff is an Oregon corporation operating a clinical testing laboratory. It tests and analyzes biological specimens and samples, which it receives by mail from physicians and pharmaceutical companies throughout the United States. Defendant McMullen is head of the Fact Finding Unit of defendant Columbia Broadcasting System, Inc. (CBS). Schaeffer is head of the Bureau of Laboratories of the New York City Department of Health. Cronkite is the featured news commentator on "CBS Evening News," a nightly television broadcast. Buhler is President of the College of American Pathologists.

Defendants participated in the telecasts "CBS Evening News with Walter Cronkite" on the evenings of June 22nd, 23rd and 24th, 1965, and in the broadcasts of "The World Tonight" on June 22nd and 23rd. Defendants also caused the publication of a news release on June 23rd, describing the disclosures made on the telecast of the night before.

Before the programs and news release were published on June 23rd, plaintiff demanded, by telephone, that CBS retract the alleged implications of statements during the June 22nd programs. CBS took no such action. Later on June 23rd, CBS contacted plaintiff through its affiliate, KOIN-TV, requesting pictures of plaintiff's operations and an interview with its employees, with a view toward publishing these as a part of the June 24th edition of "CBS Evening News." Pictures were taken by KOIN-TV personnel, and an interview with one of plaintiff's employees was recorded. These materials were sent to CBS on June 24th, but did not appear on the June 24th programs, and have not appeared since.

Plaintiff claims that the broadcasts of June 22nd

and June 23rd were seen and heard by persons within and without Oregon. These persons, and the persons and organizations who received the news release, are said to have understood the matter therein to refer to plaintiff. Plaintiff claims that its business damage as a result of these publications totals $500,000.00, that it has lost $100,000.00 worth of physicians' accounts, and that it is entitled to exemplary damages in the sum of $500,000.00.

The broadcasts publicized the results of a five-month investigation by Jay McMullen and the CBS News Fact Finding Unit. Under the name of a "cooperating physician" in New York City, letters were sent to 43 mail-order laboratories outside New York State, in 33 cities in 14 states (not including Oregon, as a map displayed on one of the broadcasts showed.) Thirteen of these did not reply; thirteen others, according to McMullen, "said that most of the tests required could not be handled accurately through the mails . . . and suggested that these tests be done locally in New York City." Seventeen, or 39%, sent the equipment and mailing containers requested in the letters, indicating their willingness to conduct one or more of the six routine laboratory experiments described. Specimens were prepared and packaged in the containers and immediately airmailed back. Samples of each specimen were also sent to four control laboratories in New York City. Comparison of the findings formed the basis of the "Special Report." The results, in substance, were as follows:

1. Bacterial specimen—Salmonella, Group D: 100% of the mail-order laboratories tested failed to identify it as a Salmonella of any kind. Group D Salmonella includes an organism capable of causing typhoid fever.

2. Prothrombin Time Test—how quickly does blood clot?: the control laboratories found that the blood specimen submitted was in a normal range. The mail-order laboratories which reported said that the clotting time was between 50 and 53% below normal.

3. Acid Phosphatase Test—control laboratories said the specimen was normal; of the mail-order laboratories tested, 25% said it was abnormal.

4. Blood Sugar—found by control laboratories to be abnormally high in blood sugar, an indication of diabetes; 4 mail-order laboratories said it was normal; the reports of 71% of the mail-order laboratories replying varied from the control laboratories' reports by from 20% to 104%.

5. Complete blood count and urinalysis—the medical experts agreed that the reports of the mail-order laboratories showed "a disturbing variation" from the reports of the hospital control laboratories.

Of five New York City laboratories subsequently tested, and one of the control laboratories, all failed the "Salmonella Group D" test.

These disclosures were made on the Cronkite broadcast of June 22nd and repeated on "The World Tonight" later that evening. The next evening, both programs were devoted to a single laboratory that had failed the same test, a "hormone assay" on urine, 12 times, and to the unethical practices in which CBS research indicated the laboratory's owners were involved. The third release of June 23rd summarized the first telecast.

Plaintiff contends that slogans flashed across the

television images during the first telecast, stating the percentage of error among the mail-order laboratories tested, did not limit the reference to only those laboratories which participated in the survey, e.g., "Mail Order Laboratories 100% Wrong." The dialogue set forth in the Addendum is representative of the materials and includes all references that conceivably could be construed as relating inferentially to United Medical Laboratories.

CONTENTIONS

I. *Were the "references" published clearly limited to parties explicitly identified, or identified as participants in the CBS tests?*

On the telecast of June 22nd, Cronkite noted the widespread reliance by doctors on mail-order tests. Giving short shrift to the view that such reliance is often necessary because of the deficiencies of local laboratories, he said that "for *some* small town doctors the inducement *may* be *partly convenience.*" (Emphasis supplied.) This, coupled with the dramatic statement that "anyone" can engage in such a business without fear of federal interference, the two statements being sandwiched around a charge that some mail-order laboratories advertise "cut rate service," conyeys the impression that the practice may often be neither necessary nor greatly advantageous in the treatment of patients.

Dr. Buhler is then heard to say that results are often inaccurate due to the deterioration of specimens in the mails; McMullen, however, immediately refers to this as a "doubt," shared by many experts, as to the possibility of accurate testing of certain specimens through the mails.

All of this is immediately clarified as speculation, insofar as it may suggest inferences relating to mail-order laboratories generally, by McMullen's explanation of the CBS investigation. Of 43 laboratories contacted outside New York, 13 replied, saying that the specimens mailed could not be tested accurately by mail. Only 17 labs, less than half of those contacted (excluding the five New York laboratories), attempted to perform the tests.

Despite whatever might have been suggested by the slogans flashed across the screen, the dialogue clearly emphasized the fact that the results being reported related *only* to the laboratories actually tested. The concluding comments of Cronkite and McMullen referring to the "labs in question" and the "labs tested," may hint at problems inherent in mail-order work, but include the following clear qualification by McMullen: "How typical are these results? *We don't know*, but a sick patient may get only one chance to find out."

Similarly, McMullen's explanation of the investigation, and his concluding remarks, clarified any possible broad connotations of Calmer's remarks on the radio broadcast of June 22nd. Calmer spoke briefly of "mail-order medicine," then of how far "your doctor" might ship a sample of "your blood," but his remarks were immediately followed by the interview and comment aired earlier on the Cronkite show.

The news release of June 23rd is nothing more than a recitation of the test results, clearly indicating, in context, that the figures quoted related only to the laboratories tested, and were not projected estimates of the probable performance of mail-order laboratories generally. It merely repeats the fact that

various authorities "doubted" the ability of such laboratories to perform certain kinds of tests, due to the deterioration of the specimens in the mails.

The telecast of June 23rd includes a summary by Cronkite of the test-results broadcast the night before, showing "widespread error among the mail order labs *checked* by the CBS News Fact Finding Unit." (Emphasis supplied.) The rest of the program was devoted to the Science Laboratories incident. Calmer's introduction to the same incident also clearly restated the findings of the tests, and included a reference to the "doubts" of medical authorities about mail-order testing of certain specimens. His program ended with a statement by Dr. Luther Terry that Terry's office was investigating "the matter," and with Calmer's report that Senator Javits had proposed legislation requiring mail-order laboratories generally to be inspected and licensed. Throughout these programs, the only trace to be found of a reference to mail-order laboratories generally is Cronkite's conclusion: "And how do the mail order labs themselves react to the findings . . .? A laboratory spokesman replies on this program tomorrow night."

The telecast of June 24th, including interviews with government officials who were investigating the same general subject of mail-order testing, contained an explicit statement by Cronkite that CBS had not "necessarily" intended to indict mail-order laboratories generally. There was then presented an interview with a research-laboratory medical consultant who insisted that the specimens used *were* amenable to testing by mail, provided that proper precautions were taken by the laboratories and doctors.

From a survey of the allegedly defamatory mate-

rials taken together, or of any one of them taken singly, I conclude that the programs and news release were clearly limited in reference to the participants in the CBS tests. No inference could reasonably be made, from what was said, that mail-order laboratories generally would perform as poorly as those which were tested, or that any particular laboratory would perform poorly at all.

It is certainly true that the programs are reasonably calculated to attract attention to the business generally, and to create concern, if not suspicion, from which no mail-order medical laboratory would be altogether immune. However, no "charges" were made or insinuated. I believe from the transcripts that the programs were carefully planned to avoid that error. By repeated reference to the "labs tested," etc., and to the "doubts" rather than the "conclusions" or "opinions" of medical authorities about mail-order testing of certain specimens, the error was avoided. The whole point of such a "Special Report," however, is to create interest and, thus, inspire inquiry to determine if there are problems with which the public, and public officials, should be concerned. That much is evident from the repeated references to the absence of federal effective state supervision of mail-order testing. The materials here in issue are perhaps best described as "calling into question" the practices of mail-order laboratories generally, and the reliability of mail-order testing itself.

It has long been settled that on matters of public concern, reporting and questioning the conduct of private individuals and public officials is a proper function of public communications media. *Thornhill* v. *Alabama*, 310 U.S. 88, 101-2 (1940).

Furthermore, it is well established that radio and television media share these rights for the same reasons. *American Broadcasting Co.* v. *United States*, 110 F. Supp. 374, 389 (S.D. N.Y. 1953), *aff'd. sub nom, FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954). By virtue of the requirements of 47 U.S.C. § 315 (a) (4), all FCC licenses are subject to a statutory requirement that they "afford reasonable opportunity for discussion of conflicting views on issues of public importance." This applies not only to editorial comment, but also to programming. There may even be a social and moral duty to inform the public, with good motives, and proper purposes, of medical problems in a community. *Blanchard* v. *Claremont Eagle* (N.H. 1941), 63 A.2d 791, 794 (1941) and, there is no doubt that medical quackery is a matter of great public concern. *Brinkley* v. *Fishbein*, 110 F.2d 62, 64 (5th Cir. 1940). That the performance of the laboratories here under scrutiny, relating, as it does, to public health, is a matter of public interest, cannot be questioned. Any discussion of the conduct of some persons or institutions in any business or profession, will naturally lead to questions with reference to the members of businesses or professions similarly situated. True enough, the statements, at times, went somewhat beyond bare reporting, but certainly that fact is not controlling. Even a statement of the bare findings, would, in my opinion, raise the same questions in the public's mind. Conceding that there are a number of statements, when taken out of context, which could conceivably refer to mail-order laboratories other than those tested, the overwhelming majority of those statements, when read in context, either clearly restrict the scope of the presentation or explicitly attribute the test results to the errors of

individually named laboratories. I am persuaded that any actionable references were here clearly limited to the parties explicitly identified and to the laboratories participating in the surveys. Plaintiff does not fall in either one of those categories. The complaint does not state a claim.

II. Although my views just expressed dispose of the case, I recognize the probability of an appeal and that the appellate court might be interested in my impressions on other theories, so ably briefed by counsel.

It is inevitable, as previously stated, that public discussion of the conduct of persons and institutions will suggest public interest in persons and institutions similarly situated. If such "suggestion" is actionable, and we must inquire into the composition of the "class," the following observations are pertinent.

First, it was made clear that not all of the laboratories participated in all of the tests. Excepting only the five New York laboratories which performed only the "Salmonella" test, the findings reveal that not all of the laboratories were wrong on all of the tests they did perform. While all laboratories did fail the "Salmonella" test, 13 of the 48 laboratories contacted frankly admitted that they could not perform the requested tests, and another 13 made no reply at all to the CBS solicitations. Thus, at least 27.1% of the laboratories surveyed, and conceivably as many as 54.2%, were conscientious enough not to try to perform the analysis requested. At most, then, the suggestion is that some, but not all similarly situated laboratories might also try and fail to perform some, but not all of these analyses.

Secondly, the commentative materials, taken to-

gether or singly, simply do not justify the inference that the CBS findings call into question more than an unspecified portion of the "class" of "mail-order laboratories." Aside from the apparent care taken by defendants to avoid generalizations, as shown by the phrasing of the excerpts, the first and third telecasts, and the first radio broadcast, included explicit statements by Cronkite and McMullen that the laboratories tested did not necessarily typify the industry generally. The third telecast included the vigorous assertions of Dr. Winkelman to the same effect. Dr. Winkelman, concededly, did "fear" that mail-order laboratories had gotten a "bad reputation" because of Cronkite's programs.

Thirdly, as to the suitability of certain specimens for mail-order testing, it is not fair to treat either the findings or the commentary as "class" references. The emphasis is, to repeat it again, on the "doubts" of the experts. Most of the findings are recited in terms of the laboratories "tested" or "replying," and in all but one of the tests it is evident that not all of the laboratories were in error. It is apparent that all 17 of the first-contacted laboratories took, and failed, the "Salmonella" test; at least, the materials do not say otherwise. Counting the New York laboratories later tested, all laboratories participating failed the test. Dr. Buhler's commentary, however, says that there are "specimens" which "deteriorate due to time and temperature," then offers this perfectly innocuous observation:

> "Any laboratory that would accept a specimen on which accurate results cannot be obtained may be endangering the health and even the life of a patient."

He does *not* say, or imply, that any of the specimens used in the tests are *never* susceptible of accurate mail-order analysis. Thus, if the discussion of the specimens here tested *is* deemed to go beyond the laboratories participating in the CBS survey, it still would not refer to all those who accept these specimens. It would imply, at most, that these specimens present problems for mail-order testing, and that "Salmonella Group D" presents a bigger problem than most.

I hold that the materials here made no reference to an ascertainable "class" of laboratories. In *American Civil Liberties Union* v. *Kiely*, 40 F.2d 451 (2d Cir. 1930), a statute forbade the mailing of defamatory matter. The Postmaster refused to transmit certain envelopes on which appeared slogans condemning the unjust conviction of one Tom Mooney, and impugning "California justice" Judge Augustus Hand recognized "an old rule of the common law:"

> ". . . where words complained of reflect on a class of persons generally without making it evident that *every* person of the class is referred to, no member can maintain an action. . . . When, however, the words reflect on each member of a class, each one may have an action, because the charge is made broadly against all.
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> * * * * *
>
> *(T)he words . . . must charge some identifiable person with something. Here the inscription contains general charges against a state, a system or an indefinite class.*" (40 F.2d at 453.) (Emphasis supplied.)

The principle just stated is acknowledged in *Marr* v. *Putnam*, 196 Or. 1, 17-22, 246 P.2d 509 (1952), cit-

ing, *inter alia*, *Ryckman* v. *Delavan*, 25 Wend. Rep. 186 (N.Y. 1840); and *Le Fanu* v. *Malcomson*, 1 P.L.C. 637, 9 Eng. Rep. 910, both also cited by Judge Hand. "An impersonal reproach of an indeterminate class is not actionable," according to *Gross* v. *Cantor et al*, 270 N.Y. 93, 200 N.E. 592, 593 (1936). The same precept is stated in *Service Parking Corp.* v. *Washington Times Co.*, 92 F.2d 502, 504-6 (D.C. Cir. 1937), where the reference was to fraudulent practices by "parking lot owners" in the "downtown section" of a city and in *Blaser* v. *Krattiger*, 99 Or. 392, 195 P. 359 (1921), where the reference was to a "son of a bitch" who was "in this room," a room full of people. The plaintiff had no action; "people in this room" was not the class, as the reference was singular; the court doubted that plaintiff could establish membership in the class of those with female canine ancestry.

While the size of the class is not of paramount importance, there is a general rule that no action will lie unless some circumstances makes the statements reasonably susceptible of special application to the plaintiff. *Watts-Wagner Co., Inc.* v. *General Motors Corp.*, 64 F. Supp. 506, 508 (S.D. N.Y. 1945); *Riss & Co.* v. *Ass'n. of American R. Rs.*, 187 F. Supp. 323, 326 (D.D.C. 1960); *Fowler et al* v. *Curtis Publishing Co. et al*, 182 F.2d 377 (D.C. Cir. 1950); *Golden North Airways, Inc.* v. *Tanana Publishing Co.*, 218 F.2d 612, 618-20 (9th Cir. 1954).

Having already said that the materials here did not refer to an ascertainable class, I feel the above cases should govern. Plaintiff might still have an action, if it could show special reference to itself; that is, *other* than as a member of a class. Its evidence in

that connection, however, is very scanty, which explains why its briefs are geared to the class-reference theory. It makes the point that C. Howard Lane, of the local CBS affiliates, said that CBS would normally send a news release like the one in question to KOIN and KOIN-TV, and to the Portland newspapers, "where the program dealt specifically with something in our area. . . ." Thus, the papers might infer that the programs had been aimed at United Medical Laboratories. The theory is tenuous on its face, as the inference would still not seem to be reasonable. Further weakening the theory is the fact that the release was sent by teletype from New York City and Los Angeles, and by mimeographed copy from New York City, to cities throughout the country.

Plaintiff's cases such as *Marr* v. *Putnam, supra,* are clearly distinguishable. There, the plaintiff was the only person who would fit in the "racket" of advertising radio repair service. In other cases such as *Lathrop* v. *Sundberg,* 55 Wash. 144, 104 P. 176 (1909); *Chapa* v. *Abernethy,* 175 S.W. 166 (Texas, Civil App. 1915); *Palmerlee* v. *Nottage et al,* 119 Minn. 351, 138 N.W. 312 (1912), the class was so small that immediate identification was possible of all members. It is my belief that *Fawcett Publications, Inc.* v. *Morris,* 377 P.2d 42 (Okla. 1962), *appeal dismissed* and *cert. denied* 376 U.S. 513 (1964), *rehearing denied* 377 U.S. 924 (1964), should be placed in the same classification. There, the article in True Magazine suggested that the football players of the University of Oklahoma had, in full view of television cameras at a game, sniffed "pep-up" drugs. While the article did not state that all of the team members had "sniffed," it did leave the inference that at least the "regulars," the players who partici-

pated, "sniffed." Since there was a class to which the plaintiff was a member, there was a strong inference that he either participated in taking the "sniff," or countenanced the taking of the drug by others.

The critical inquiry into the actionability of a class reference is a reasonable certainty of reference to the plaintiff as a member. Here, two classes were involved: (1) "mail-order laboratories" and (2) "mail-order laboratories performing the particular tests." The class referred to in the materials under scrutiny would necessarily be one of the above. It is my conclusion that only class number two was covered by the published materials. Plaintiff urges that the programs made particular reference to "laboratories which operate interstate and actually service thousands of doctors."

As a matter of law, no greater aspersions were cast upon them than upon other mail-order laboratories. Cronkite did introduce the first telecast by saying:

> "Across this nation an untold number of doctors with untold thousands of patients depend on medical analysis conducted by mail order laboratories."

In no way, however, did he suggest how many doctors relied on the larger laboratories, or how many dealt with interstate operators. Nowhere in the series, or in the news release, was there any hint that *most* of the laboratories tested "operate interstate *and* serviced thousands of doctors." Indeed, any viewer who knew—if it is a fact—that these numbered about 12, knew that the odds were against it, since 48 labs were contacted initially and 22 were finally tested. The materials did comment repeatedly on the absence

of federal regulation of "mail-order laboratories," but they also commented on the lack of effective state regulation, and on the variances among the states' provisions. The officials interviewed were federal officials; but federal jurisdiction could rest as well upon the laboratories' use of the mails as upon their shipments across state lines, and this was specifically noted during the interviews of the Chief Postal Inspector and the FDA Commissioner. Finally, though the New York laboratories tested were sent specimens from out of the state, the fact is not mentioned on the air. The news release mentions it only incidentally, to show that these laboratories, like the others, were tested with specimens sent from a distance, "outside the New York city area." In short, the materials make *no* reference whatever to the size of the laboratories tested or contracted, and *no* particular point about the interstate character of the analyses conducted. Any inferences they suggest, therefore, could not reasonably be understood to apply specially to interstate concerns, small or large.

Of course, it is then irrelevant that plaintiff is among the few concerns who did the most business. No one who took his business elsewhere because of the laboratory-expose here, obviously, would take it to another mail-order laboratory, large or small.

SPECIAL PRIVILEGE

Defendants also urge that a forthright discussion of subjects pertaining to "public health" should be granted the same partial immunity as that granted to a discussion of "public officials." *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*,

379 U.S. 64 (1964). While the doctrine of partial immunity, as taught in those cases, may eventually find its way into the field of public health, I can find no supporting authority for application at this time. Quite frankly, the suggestion is not judicially unattractive. There is no reason why the communications media should keep the public less well informed about those engaged in the public health field, than about the merits and demerits of public officials. The mantle of partial immunity might well cover both.

Although I am well aware of the directives of the Court of Appeals to the trial courts in connection with the danger, under ordinary circumstances, of allowing a motion to dismiss, I find no alternative on the record before me. For that matter, the essential facts are undisputed. No claim is made by the plaintiff that the complaint could be amended so as to show additional facts beyond the present record. Since I would direct a verdict in defendants' favor on the present record, I find no reason why I should place the heavy burden of additional attorney fees and other expenses on the parties by forcing them to pre-trial and to trial.

On appeal, I would suggest that the appellate court be offered the privilege—which was mine—of seeing the telecasts. No doubt, the jurisdictional question raised by defendants will also find its way to the Court of Appeals.

ADDENDUM

There follows here representative excerpts from the telecasts, broadcasts and news releases which gave rise to this case.

A. TELECAST OF JUNE 22.

CRONKITE: ". . . Across this nation an untold number of doctors with untold thousands of patients depend on medical analysis conducted by mail order laboratories. . . . For some small town doctors the inducement may be partly convenience. But some mail order laboratories advertise the economic benefits of their cut rate service. . . . But the mail order laboratory business operates virtually without government control. As far as the Federal law is concerned, anyone, no matter what his qualifications, can open up a clinical laboratory and engage in interstate business. . . ."

BUHLER: ". . . While it is true that accurate results can be obtained on some specimens sent through the mail, there are many which deteriorate due to temperature and time and the results are inaccurate. Any laboratory that would accept a specimen on which accurate results cannot be obtained may be endangering the health and even the life of a patient."

McMULLEN: "Because numerous health authorities share the doubt that many types of human medical specimens cannot be tested accurately after they have been sent through the mails, we decided to set up an experiment to test mail order laboratories. . . ."

SHAEFFER: (Throughout the statement of the test results by McMullen on this first broadcast, Shaeffer interjected comments as to the gravity of the errors involved.)

McMULLEN: ". . . The final results of our experiment; 88 per cent of the 17 mail order laboratories tested were wrong on one or more of the tests they undertook. (He then reported that the 5 New

York City laboratories tested, and one control lab, were all wrong on the 'Salmonella Group D' test.) . . . How typical are these results? We don't know, but a sick patient may get only one chance to find out."

CRONKITE: "And . . . we'd like to underscore that the labs in question are all mail order laboratories, not the community laboratories that do the bulk of the nation's medical testing. . . ."

B. RADIO BROADCAST OF JUNE 22.

CALMER (introducing the program):

"From a CBS NEWS fact-finding team, disclosures on mail order medicine; . . . ."

". . . Today your doctor may take a sample of your blood, urine or some other medical specimen, air mail it for testing to a mail order laboratory across the country, and receive back a report on the results. Mail order labs, some of them offering cut rates to doctors, operate virtually without state or federal control. . . ."

(Thereafter there followed the same byplay with McMullen and Shaeffer as occurred on Cronkite's telecast.)

C. NEWS RELEASE OF JUNE 23.

"Of medical specimen tests undertaken by mail order medical laboratories throughout the country during a CBS News Fact Finding Unit investigation into the accuracy of mail order labs, 100 per cent of the labs failed to identify two specimens; 88 per cent were wrong in one or more of the tests they undertook."

(There follows a recitation of the test results, in which it is clear that the percentages of error refer to laboratories which participated, not laboratories generally.)

"The accuracy of mail order laboratories was tested because numerous health authorities, including members of the American Medical Association and the College of American Pathologists, have doubted the ability of mail order labs to perform accurately many types of routine laboratory tests, particularly since the specimens involved in these tests are affected by temperature and decompose rapidly during mail shipments."

D. TELECAST OF JUNE 23.

CRONKITE: "Last night, we presented the first in a series of reports on mail order medical laboratories. Our report indicated widespread error among the mail order labs checked by the CBS News Fact Finding Unit. Eighty-eight per cent of those labs were wrong on one or more of the tests they undertook, tests that could involve life or death. That first report involved many laboratories testing actual medical specimens. But tonight's report involves only one lab. . . ."

(There followed a byplay among Cronkite, McMullen and Drs. Shaeffer and Kogon, relating to the detailed investigation of the Nutritional Research-Science Laboratories-Professional Foods nexus. Nutritional Research had sent literature to one of CBS' cooperating physicians, advertising Urine Hormone Assays at a low price. Physicians sent 12 samples of distilled water, colored yellow; these were treated by Science Laboratories, which found hormones of seven

different categories. All of its reports suggested low metabolism, and suggested nutritional supplements. Several days later, and in following weeks, representatives of Professional Foods contacted each of the physicians; these representatives received copies of the assays from Nutritional Research. The same man is president of Nutritional Research and owner of Professional Foods.)

CRONKITE: ". . . And how do the mail order labs themselves react to the findings of the CBS News Fact Finding Unit? A laboratory spokesman replies on this program tomorrow night."

E. RADIO BROADCAST OF JUNE 23.

CALMER: "Last evening THE WORLD TONIGHT presented an exclusive report on a CBS News Fact Finding unit investigation of cut-rate mail-order medical laboratories. Many medical authorities have doubted that these labs, virtually without federal or state regulation, can accurately test various types of medical specimines [sic] sent them by doctors. Yet, thousands of doctors use them. In the CBS investigation 87 per cent of the labs were wrong on one or more of the tests they undertook. 100 percent were wrong on two of the tests. . . ."

TERRY (Surgeon General): "Well, as a physician I am greatly concerned about the inaccuracies of laboratories as reflected by these studies. I think from two standpoints the Federal Government has a definite concern. . . . Certainly as soon as I can get back to my office we'll study the matter very carefully."

CALMER: "Following last night's disclosures . . . Senator Jacob Javits proposed that Congress pass a bill requiring federal inspection and licensing of med-

ical laboratories which diagnose specimens sent to them through the mails."

F. TELECAST OF JUNE 24.

(Chief Postal Inspector Henry Montague, and Food and Drug Administration Commissioner George Larrick, were interviewed. Both said they were conducting investigations in the general area of the mail-order testing business.)

LARRICK: ". . . I have not been briefed on our most recent investigation in this field . . . which is being stimulated by Mr. McMullen's investigation. And we will, when we conclude the study of that investigation, then reach a conclusion about whether we should recommend additional legislation."

CRONKITE: ". . . The CBS News investigation of mail order medical laboratories has indicated that many firms submitted faulty reports on specimens. But this is not necessarily to be considered an indictment of all laboratories that do business by mail. Many others insist their standards are high, and that mail order medical testing can be reliable. . . ."

WINKELMAN (Medical Consultant at Kings County Research Laboratory in Brooklyn):

(In an interview with Dave Dugan of CBS, Winkelman said that it was "possible" for specimens to deteriorate in the mails, but that "precautions can easily be taken and proper instructions can be given to the doctors who are going to submit their specimens through the mail so as to preserve the stability and the sterility of the specimens . . . especially in the six tests that were described by your office." He said further, "The value of performing laboratory tests

through the mail is going to increase in the future. There are many tests that are being done now that are simply beyond the realm of a small, local laboratory." He felt "very strongly" that "laboratories that do their business through the mail have gotten a bad reputation." "The condemnation," he said, "has been in the last two days on Mr. Cronkite's program that the inaccuracy of these results has been due to the fact that the specimens were submitted by the mail. I maintain that tests of specimens submitted by the mail are and can be performed accurately. If accurate results were found in those laboratories listed in the last two days, it was not due to the fact that it was submitted by mail. The error is due to the laboratory itself.")

CRONKITE: "Our problem, as Jay McMullen pointed out originally, is that many mail order laboratories operate virtually without Government supervision; laws vary widely from state to state, and the quality of laboratory analysis can vary just as widely."

ON PETITION FOR REHEARING

This cause is before the Court on the plaintiff's motion for a rehearing on the defendants' motion for a dismissal, which the Court treated as a motion for a summary judgment, or in the alternative for an order supplementing the record with an affidavit tendered with said motion. The motion was served on the 21st day of September, 1966, which would be the thirteenth day following the entry of the judgment of dismissal.

Rule 59 (a) and (b),[1] FRCivP, fixes the grounds

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[1] Rule 59 (a) and (b) provides as follows:

"(a) *Grounds.* A new trial may be granted to all or

and the time within which a motion for a new trial may be served in either a trial by jury or a trial by the Court.

It has been uniformly held that a petition for a rehearing is, under these rules, in all respects the same as a motion for a new trial. *Safeway Stores, Inc.* v. *Coe*, 136 F.2d 771 (D.C. Cir. 1943); *Slater* v. *Peyser*, 200 F.2d 360 (D.C. Cir. 1952); *American Oil Co.* v. *Carey*, 246 F. Supp. 773 (E.D. Mich. S.D. 1965).

On the showing before me, I find no mistake, inadvertence, excusable neglect nor any other reason which might justify relief under Rule 60 (b), FRCivP. Certainly, I cannot find that the interests of justice require a rehearing. *Sternstein* v. *"Italia"-Societa Per Azioni Di Navigazione-Cenoa*, 275 F.2d 502 (2d Cir. 1960). For that matter, Rule 60 (b) is not intended to serve the same purposes as Rule 59. *John E. Smith's Sons Co.* v. *Lattimer Foundry & Mach. Co.*, 19 F.R.D. 379, aff'd. 239 F.2d 815 (3d Cir. 1956).

Aside from the legal roadblock which may be presented by the requirements of Rule 59 (a) and (b), the record reveals that counsel for both parties, at

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any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

"(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment. . . ."

the time of submission, stated that the Court had before it all of the evidence on liability that might be presented at the time of trial. The record shows that I viewed the films on February 22nd, the last memorandum being received before mid-March, 1966. The opinion and order of dismissal were dated September 8, 1966. Counsel offers no reasonable explanation as to why the additional material could not have been supplied, either before or after submission, or in the lengthy period in which the Court had the matter under submission. I must, therefore, exercise my discretion against granting a rehearing or permitting the plaintiff to supplement the record.

For that matter, I seriously question if the tendered affidavit presents evidence which would, in any way, alter my original opinion.

The motion for a rehearing, and the alternative to supplement the record, is denied.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED MEDICAL LABORATORIES, INC., *Appellant,*
vs.
COLUMBIA BROADCASTING SYSTEM, INC., et. al., *Appellees.*
No. 21,446

[November 18, 1968]

Appeal from the United States District Court
for the District of Oregon

Before: CHAMBERS, Chief Judge, JOHNSEN* and KOELSCH, Circuit Judges.

JOHNSEN, Circuit Judge

The District Court dismissed on summary judgment, 258 F. Supp. 735, an action in diversity jurisdiction for a claim of libel under Oregon law. We affirm the judgment, but upon another ground than those on which the court predicated its decision.

As involved here, the defamation claim was one asserted by United Medical Laboratories, Inc., (herein United Labs), a mail order clinical testing laboratory, of Portland, Oregon, against Columbia Broadcasting System, Inc., Walter Cronkite, one of its featured newscasters and commentators, and Jay McMullen, one of its producers, (herein collectively CBS).

The basis of the claim was a series of national television broadcasts, radio broadcasts and press re-

* Harvey M. Johnsen, Senior Circuit Judge of the Eighth Circuit, sitting by designation.

leases engaged in by CBS—each three in number—primarily reporting on the inaccuracies in the results of some tests of clinical specimens which CBS had had made, through some cooperating physicians, by 22 mail order laboratories throughout the country, and commenting on the significance of the inaccuracies as questions of risk to personal health and lack of public regulation[1].

The publications gave individual identification to only one of the laboratories by which the tests had been performed, but a map was used on one of the telecasts to indicate the various states in which the laboratories involved were located. This map showed that none of those making the tests was located in Oregon.

United Labs claimed, however, to have been libeled by the publications in that, allegedly, the reports and comments had conveyed and were meant to convey the implication and understanding that the testing inaccuracies which had occurred were typical of all mail order laboratories—a fact which United Labs asserted was not true and was specifically false as to it. It further contended that in view of its prominence as one of the largest mail order laboratories in the United States (with "more than 4,000 doctors, numerous medical schools, and a number of national drug companies" as clients, and making "in excess of 500,000 tests per month"), the broadcasts had been professionally regarded, both locally and nationally, as having particular application to it.

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[1] The three television broadcasts are set out in an Appendix hereto, with the press release made as to the third one being used here (as it was in the record) to show the contents of that broadcast. The other publications, radio and press, are not reproduced because of their substantial identity to the telecasts.

In addition, United Labs charged that the publications were intendedly aimed at it; that because of the position which it occupied in the field, CBS had meant and had caused it to be personally subjected "to public scorn, contempt and hatred as an incompetent, inaccurate and cut-rate business which was and is endangering the health and lives of people throughout the United States"; and that in engaging in such untrue defamation against it, in permitting the libel to operate to greatly injure its business and reputation, and in not making any retraction on request, CBS had acted with malice toward it.

Recovery was sought of $5,000,000 in general damages, $100,000 in special damages and $5,000,000 in punitive damages.

The District Court held that the defamation was without any such reference to United Labs, either class or special, as would enable it to maintain a libel action under Oregon law. In substance, the basis of the court's decision was that the publications were on their face so "clearly limited" as to be incapable of having any general reach or reference and as only to cover individually the particular mail-order laboratories which had performed the tests; that they thus were without room for any contention of reference having been intended or of application being reasonably able to attach to other mail order laboratories on a class basis; that United Labs, however, "might still have an action, if it could show special reference to itself; that is, *other* than as a member of a class"; but that as to this aspect its showing in resistance to the motion for summary judgment set out facts and circumstances which were only "very scanty"—such as not to be able in the court's opinion to support any

inference of special reference. 258 F. Supp. at 740, 741, 742 and 743.

On our reading of the Oregon cases, we believe that these conclusions accorded too narrow a scope to Oregon libel law, in their views that no such reach legally could exist on the text of the publications as to make it possible for any class reference to be involved against United Labs; and that further no such possible special reference (either by attachment from United Labs' prominence in the field or from any other circumstances in the situation) appeared to be establishable, as could make the injury sustained to United Labs' business and reputation, from application of the publications having in fact been made to it, give rise to a defamation claim.

Under the Oregon decisions, as well as generally, the question or reference in defamation, whether alleged to exist on a class or a special basis, can sufficiently be a matter of what application actually has been given to the publication by reasonable understanding and belief. See e.g. *Marr* v. *Putnam*, 196 Or. 1, 246 P.2d 509, 515, and 213 Or 17, 321 P.2d 1061, 1065 (second appeal). Also see Restatement, Torts, § 564; Restatement, Torts, Second, Tentative Draft No. 11, § 564A.

Corollarily, it would follow that such an extent of actual application may occur as to provide substantial probativeness on the reasonableness of the understanding and belief engaged in, and in these circumstances to cause the question of reference generally to become one of fact on all the evidentiary elements involved. In such a situation the question of reference would not, except in special circumstances. be subject to resolution as a matter of law or to disposition on a summary basis.

As to class defamation, however, the courts have engaged in a limitation or exception to this—which has not had and perhaps cannot be given any definitiveness—of cutting off all possible application to a class or group upon the basis that the size thereof, when considered in relation to the nature or circumstances of the defamation, is such as to create legal uncertainty or remoteness, and so to entitle the publication to be held incapable as a matter of law of being reasonably understood and believed to have reference or attachability to each member of the class or group. See Prosser, Law of Torts, 3rd ed., § 106, pp. 767-769; Restatement, Torts, Second, Tentative Draft No. 11, § 564A, *supra*. But cf. *Fawcett Publications, Inc.* v. *Morris, Okl.*, 377 P.2d 42, 51.

We need not, however, consider that question further. The District Court did not dispose of the case upon this basis, and upon the record we would not feel warranted in using that possible aspect here as a means of affirming the judgment, which CBS urges us to do. While there is general showing that large numbers of testing laboratories (apparently thousands) exist throughout the country, the affidavits do not enable it to be said how many, even of those set out in partial general list, are "mail order clinical laboratories" in the sense that the characterizing term "mail order" can be argued to have had aim and been given application from the publications. Thus, numerous community laboratories appear to be included in the partial list, which may permit some mailing of specimens to them in local incident or convenience, but which we are not willing to brand abstractly, in attempted basis to uphold the summary judgment here, as being engaged in the "mail order laboratory business," within the arguable thrust of the publications.

Furthermore, even if the matter of class reference, as a question under Oregon law, had been thus subject to summary disposition, there would still remain the matter of the court's similar disposition of the question of special reference. The showing contained in United Labs' affidavits as to the extent of the application which had in fact occurred against it — clients' and other professional expressions which had been made; $100,000 drop in business volume; lapse of pending business-contract negotiations; etc. —provided such substantial probativeness on the reasonableness of the understanding and belief which had occurred as in our opinion to require that the question of special reference under Oregon law be at least carried beyond the point of summary judgment.

While we indicated at the start that we were affirming the judgment upon another ground (here a federal one), we have engaged in discussing the District Court's disposition, because we would have chosen to let the termination of this diversity libel litigation stand upon the state basis attempted by the District Court, had we deemed it possible to do so.

The federal question to which we here are resorting for affirmance is one which was considered and discussed by the District Court, 258 F. Supp. at 743-744, as follows:

> "Defendants also urge that a forthright discussion of subjects pertaining to 'public health' should be granted the same partial immunity as that granted to a discussion of 'public officials.' *Rosenblat* v. *Baer*, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Garrison* v. *State of Louisiana*,

> 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). While the doctrine of partial immunity, as taught in those cases, may eventually find its way into the field of public health, I can find no supporting authority for application at this time. Quite frankly, the suggestion is not judicially unattractive. There is no reason why the communications media should keep the public less well informed about those engaged in the public health field, than about the merits and demerits of public officials. The mantle of partial immunity might well cover both."

As previously indicated (footnote 1), we have set out in an Appendix hereto the full text of the three television broadcasts, and this should be read in basis for the relationship to the discussion which follows.

At the time of the District Court's decision, as its opinion noted, the Supreme Court had made initial First Amendment thrust at state libel law in relation to "public officials," by the *New York Times*, *Garrison* and *Rosenblat* cases. Thereafter, prior to the argument of the appeal here, this constitutional thrust had been extended by *Associated Press* v. *Walker* and *Curtis Publishing Co.* v. *Butts* (joint opinion), 368 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2nd 1094, to defamation related to "public figures, and by *Time, Inc.* v. *Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456, to "suits for invasion of privacy based on false statement where a 'matter of public interest' is involved."[2]

Further, during the period that we have held the appeal under advisement, the Court has declared First

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[2] Charactrization of the holding in *Hill* as made by the opinion in *Pickering* v. *Board of Education, infra*, 391 U.S. 563, 573, 88 S. Ct. 1731, 1737.

Amendment immunity and the standard for defeasance thereof as announced in *New York Times* applicable to protect a public school teacher from dismissal penalty for writing a letter to a newspaper criticizing acts and policies of the Board of Education and the Superintendent of the District on matters in which the public had a legitimate interest. *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S. Ct. 1731. The Board had determined, after a full hearing, that the letter contained eight false principal statements and that its publication was "detrimental to the efficient operation and administration of the schools of the district."

The Court, however, in making application of the *New York Times* standard against state-law disciplinary consequence, appraised four of the statements as being substantially correct or accurate and the other four, although "factually incorrect in varying degrees," as being "perfectly consistent with good-faith error" and without "evidence in the record to show that anything other than carelessness or insufficient information was responsible for their being made." The significance of the case here is in its extension of the application of the *New York Times* standard, as summarized by Mr. Justice White in his separate opinion: "The core of today's decision is the holding that Pickering's discharge must be tested by the standard of *New York Times Co.* v. *Sullivan* * * *" 391 U.S. at 583, 88 S. Ct. at 1742.

Another decision in the First Amendment field, *St. Amant* v. *Thompson*, 390 U.S. 727, 88 S. Ct. 1323, has also been rendered by the Court while we have been holding the appeal under advisement. That case, however, did not make an extension but merely a re-

application of the scope of *New York Times*, since it involved a libel action brought by a deputy sheriff whom the Court treated as a public official. But the opinion, in setting aside the judgment of recovery, took occasion to remind that the standard of *New York Times* was not to be regarded as having had "its outer limits * * * marked out" so as not to be open to further definition. It characterized *New York Times* and the subsequent cases in which the standard thereof had been applied, either directly or analogously, as having provided "meaningful guidance for the further definition" of the standard.

Of the most relevance here, however, is the fact that the opinion took occasion to reiterate, as the other cases had done (*New York Times, Garrison, Rosenblatt, Walker, Butts, Hill* and *Pickering*), the fundamental basis on which all of the Court's First Amendment thrusts into the various fields thus far presented has rested—the right of the public to have an interest in the matter involved and its right therefore to know or be informed about it.

We think it clear that the area of First Amendment application in protection against state law consequence for injury from speech or publication, where "a matter of public interest" is involved, has had substantial extension since the *New York Times* case and the District Court's decision.

It is, of course, not possible to say just how far the Court will continue to carry such extensions.[3] But

[3] Followng the *New York Times* decision, Professor Harry Kalven wrote: "It is not eas yto predict what the Court will see in the *Times* Opinion as the years roll by. It may regard the opinion as covering simply one pocket of cases, those dealing with libel of public officials, and not destructive of the earlier notions that are inconsistent only

unless all other areas, not merely those of legitimate general interest but also those of affecting personal concern to the public, are to be artificially ignored, we are not able to see how the path upon which the Court has been moving can be regarded as having reached an end. And in relation to this, while the Court has been careful to indicate that each move which it has made constitutes only a specific footstep, there has not been in the large volume of discussion in which it has engaged any suggestion of hesitancy or doubt on the part of a majority as to the correctness of the path opened up and the steps taken thereon.

Even among the minority, as *Hill*, *Butts* and *Walker* seem to us to reflect, the question in the situations dealt with has not been over the extending of First Amendment immunity to any of them. Rather, the difference has been on whether there should be gradations in the standard for defeasance of the immunity (in effect negligence, gross negligence and reckless disregard, respectively) to enable the falsity occurring in a publication to be dealt with on varying responsibility as to the type of situation involved. The minority would seem to desire appraisal of the nature of the public interest at stake and gradations on the

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with the larger reading of the Court's action. But the invitation to follow a dialetic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming." Kalven, *The New York Times Case*, 1964 The Supreme Court Review, 191, 221.

After *Hill*, *Butts* and *Walker*, he further wrote: "The one certain prediction I can make is that judicial review of the common law of defamation, launched by the *New York Times* case, is to be with us for a while to come." Kalven, *The Reasonable Man and The First Amendment: Hill, Butts* and *Walker*, 1967 The Supreme Court Review, 267, 269.

basis thereof as to making the immunity defeasible for the incompleteness, inaccuracy and falsity occurring in the statements and comments made.

That question, however, is not of significance in the present situation. If the publications here are within the field of First Amendment protection at all as against the consequences of state libel law, the area of public interest to which they relate—conditions allegedly capable of wide-spreadedly affecting public health—would seem to us to be one of such inherent public concern and stake that there could be no possible question as to the applicability of the *New York Times* standard for any defeasance.

The crucial question here then is whether First Amendment immunity can properly be regarded as extending to disclosure and discussion of professional practices and conditions in the health area involved, so that those engaged in the particular field who may claim to have been stained by such a publication will be subject, in any seeking of redress, to application of the federal standard for defeasance of the Amendment immunity, instead of to the standards of state libel law for removery.

We have no difficulty in so concluding. The step seems to us no more venturesome than the extension which had been made of *New York Times* to public figures by the cases of *Pauling* v. *News Syndicate Co.*, 335 F.2d 659 (2 Cir. 1964) and *Pauling* v. *Globe Democrat Pub. Co.*, 362 F.2d 188 (8 Cir. 1966), before the decisions in *Butts* and *Walker* had been rendered.

Those cases engaged in some analogy of public figures to public officials. In outer respects, such an analogy might have more closeness than one between

public officials and persons engaged in the activities here involved. Thus, such persons could perhaps claim not to have offered themselves to the limelight as have public officials and public figures. But though limelight may be a factor in public interest occurring, it can hardly be held to constitute a condition for the right of public interest to exist. Indeed, in the case of Mr. Butts at least, the factor of limelight would seem to have been a relatively subordinate one in the national publication involved.

The primary basis of general interest in the *Butts* situation would have to be regarded as the public's right to be concerned over the nature and significance of the things alleged to have been done, with the persons said to have done them being secondary elements therein. Thus, if some analogy were to be looked for here, in caution against an uncertain extension of First Amendment immunity being made, this aspect would exist sufficiently in the elements of the field in which United Labs was engaged being, from the nature and extent of its capacity to affect health, as naturally entitled to public gaze and interest, and as inherently subject to right of public information and discussion, as were the field and activity in *Butts*—or in *Walker* and *Pauling*.

With the publication in *Butts* being held to be within First Amendment immunity and so not subject to the rules of Georgia libel law, we have no difficulty in persuading ourselves that the situation here, in such attachment as the publications could have to United Labs, is entitled to be held to be within First Amendment immunity and subject to the standard of *New York Times* for any defeasance thereof.

As to the analogy consideration in which we have engaged, it should perhaps be added that, of course, analogy has never been, in common law process, a limitation on the making of legal application or extension, but only an aid to guidance therein. Thus, the Court did not hesitate to extend First Amendment immunity in *Hill* without any attempted analogy to the situation of *New York Times*. It merely declared that its conclusion was being guided by "the First Amendment principles in *New York Times*," though not "through blind application of *New York Times*" but "only by applying these principles in (the) discrete context" of the legal and factual situation involved. 385 U.S. at 390-391, 87 S. Ct. at 543.

Holding, as we do, that First Amendment immunity and the *New York Times* standard for defeasance thereof are here controlling, we further consideredly conclude that, within the strictness applicable to the question of defeasance, as exemplified in *New York Times*, 376 U.S. at 285-291, 84 S. Ct. at 729-732, the publications and the showings provide no indication that any probative basis of substance exists in the situation on which "actual malice" might be establishable.

In order to recover, United Labs would have to prove with "convincing clarity" that the statements of the publications, if they could be defamatory of it, were made with knowledge that they were false in their alleged implications against it or were made with reckless disregard of whether they were false or not. And in order to be entitled to proceed in this respect, United Labs could be required to show, on proper challenge such as by the motion and showing for summary disposition here, that it had sufficient prob-

ative substance to be able litigably to give rise to an issue of fact on whether such malice actually existed or not.

United Labs' affidavits do not challenge the truth of the statements made as to the inaccuracies occurring in the tests involved. Its challenge in this respect is to the alleged implication of the publications that such inaccuracies were characteristic of the testing work of all mail-order laboratories, including itself.

But the initial telecast, after summarizing the various testing inaccuracies which had occurred, concluded with these comments by Cronkite:

> "How typical are these results? We don't know, but a sick patient may get only one chance to find out. And, Jay McMullen, we'd like to underscore that the labs in question are all mail-order laboratories, not the community laboratories that do the bulk of the nation's medical testing."

In the third telecast, Cronkite added these comments:

> "The CBS News investigation of mail-order medical laboratories has indicated that many firms submitted faulty reports on specimens. But this is not necessarily to be considered an indictment of all laboratories that do business by mail. Many others insist their standards are high, and that mail order medical testing can be reliable."

The telecasts were wound up by Cronkite as follows:

> "Our problem, as Jay McMullen pointed out originally, is that many mail-order laboratories operate virtually without Government supervision; laws vary widely from state to state, and the quality of laboratory analysis can vary just as widely."

Whatever could be the necessity under the liberality of state libel law of allowing these and the other expressions of the telecasts to be carried beyond the point of summary disposition, in view of the right of United Labs, as earlier discussed, to have the question of reference against it, as to such defamation as the telecasts could involve, be given consideration as well on the basis of the general extent of actual application which allegedly had been made against it and the injury which had been occasioned thereby—these aspects are not determinative here.

The primary question on the federal rule and standard is the strict one of actual malice under the safeguard of judicial scrutiny. Unless there are elements present which can judicially be said to be capable of providing a basis with "convincing clarity" for a finding of knowledge or reckless disregard, the Amendment immunity is not legally defeasible.

The publications and the showing here, as stated, contain no indication that any such probative elements exist or are capable of being produced in the situation. Comparably, as in *New York Times*, the failure of CBS to make a retraction as to United Labs would not in the circumsances provide substance for a charge of actual malice under the federal standard, as it might for one of general malice in state libel law, since there was ground for apparent good-faith contention on the part of CBS that the publications were without defamatory reference to United Labs. Indeed, on the strictness of the federal standard as to actual malice, it might perhaps even be arguable that the publications lacked any such convincingly clear reference as to require the question of malice to be considered beyond that point—but we need not deal

with and we make no intimation upon this aspect.

In concluding, we add that we have noted the recent New York Supreme Court decision in *All Diet Foods Distributors, Inc.* v. *Time, Inc.*, 290 N.Y.S.2d 445, 56 Misc. 2d 821 (1968). The case dismissed, on the basis of *New York Times*, a complaint for libel recovery under state law, brought by a retail health food and special diet food store against the publisher of a volume on nutrition. A photograph of the plaintiff's store was set out, with the caption appearing in large type on an adjoining page in the volume of "Food Fads and Frauds." The complaint charged that the purpose had been to represent that plaintiff's business was founded on fraud. The court's opinion stated:

> "Certainly the subject matter of the article under review is of considerable public interest and it cannot be said of the conduct with respect to motivation that the complaint meets the required standards. Certainly the intent here was not merely to injure through falsehood; rather the motivation was the protection of the public in the disclosure of a highly important matter affecting the public interest."

The judgment before us is affirmed.[4]

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[4] Incidentally it may be observed that The American Law Institute at its 1967 annual meeting laid aside for a time its attempt to deal with parts of the law of libel for purposes of Restatement, Torts, Second, awaiting further Supreme Court developments, 44th Annual Meeting, The American Law Institute, 1967 Proceedings, p. 188.

APPENDIX

I.

CBS NEWS FACT FINDING REPORT

Television Broadcast of June 22, 1965

CRONKITE: Tonight the first in a series of reports on mail order clinical laboratories. Across this nation an untold number of doctors with untold thousands of patients depend on medical analysis conducted by mail order laboratories. They mail blood, urine and other specimens and receive analysis by mail. For some small town doctors the inducement may be partly convenience. But some mail order laboratories advertise the economic benefits of their cut rate service. These are actual examples: "50% off," "$500 worth of tests for only $90," "Every doctor increase income and cut expenses." But the mail order laboratory business operates virtually without government control. As far as the Federal law is concerned, anyone, no matter what his qualifications, can open up a clinical laboratory and engage in interstate business. Tonight a special report by Producer Jay McMullen and the CBS News Fact Finding Unit after a five-month investigation.

McMULLEN: This is a medical laboratory in New York City. Here, hundreds of human medical specimens are tested each day. Each of these test tubes represents a patient—a man, a woman, a child. The testing of the blood, urine, or other human medical specimens in these tubes is a vital tool in the diagnosis and treatment of illness, and upon the accuracy of these tests may depend the good health and perhaps the life of the patient. Dr. Victor Buhler, President, College of American Pathologists.

DR. BUHLER: Most routine laboratory procedures are done locally. However, there is a thriving business in mail order laboratories. As we understand, thousands of physicians now utilize mail order facilities. While it is true that accurate results can be obtained on some specimens sent through the mail, there are many which deteriorate due to temperature and time and the results are inaccurate. Any laboratory that would accept a specimen on which accurate results cannot be obtained may be endangering the health or even the life of a patient.

McMULLEN: Because numerous health authorities share the doubt that many types of human medical specimens cannot be tested accurately after they have been sent through the mails, we decided to set up an experiment to test mail order laboratories. Under the name of a cooperating physician in New York City, we prepared letters requesting equipment and mailing containers for six routine laboratory tests to be used in the experiment. These letters were mailed to 43 mail order laboratories known to us to be operating outside of New York State in 33 cities in 14 states. Thirteen of the laboratories did not reply. The letters of 13 others said that most of the tests requested could not be handled accurately through the mails . . . and suggested that these tests be done locally in New York City. But 17 (or 39 per cent) of the laboratories sent us equipment for the tests they were willing to undertake. At the New York City Bureau of Laboratories, specimens for the tests were prepared and packaged in containers provided by the mail order laboratories, then immediately air-mailed to those laboratories. Samples of each specimen sent to the mail order laboratories also

were sent for testing to control laboratories in New York City—to the laboratories of St. Luke's Hospital, Cancer Memorial Hospital, the Hospital for Joint Diseases and Brooklyn Jewish Hospital. The test results mailed back by the mail order labs were compared with the results obtained by the control laboratories. All the hospital control laboratories found that the bacterial specimen we submitted to them for identification was a Salmonella, Group D—which includes an organism that causes typhoid fever. One hundred per cent of the mail order labs failed to identify this bacterium as a Salmonella of any kind. The Director of the New York City Bureau of Laboratories, Dr. Morris Schaeffer, on the significance of the test.

DR. SCHAEFER: Salmonella are bacteria which produce diseases, such as typhoid fever, food poisoning, blood poisoning, and dysentery. Infection in an individual can spread to others causing an epidemic. The failure of the mail order laboratories or any other laboratory to identify these organisms may have very serious consequences and this is very shocking, indeed.

McMULLEN: In the Prothrombin Time Test — which measures how quickly blood clots—the control labs found that the blood specimen submitted to them was in a normal range. The mail order labs, that reported on the same specimen, said the clotting time was between 50 to 53 per cent below normal.

DR. SCHAEFFER: A gross error in a Prothrombin Time Test, which measures the clotting time of blood, could cause very serious results. For example, doctors prescribe drugs to keep the clotting time of blood of their patients recovering from coronary heart

attacks 15 to 20 per cent below normal. If the lab report shows that the clotting time is low in the first place, an inadequate amount of drug may be given. That could cause another heart attack or possibly the death of the patient.

McMULLEN: Test three. The control labs agreed that the specimen submitted for the Acid Phosphatase Test was normal. But 25 per cent of the mail order labs said it was abnormal. Dr. Schaeffer.

DR. SCHAEFFER: An abnormal acid Phospatase Test could indicate that the patient had a bone tumor or a cancer of the prostate. If the test is inaccurate, unnecessary treatment or surgery could result.

McMULLEN: Test four: blood sugar. The control laboratories reported that the specimen submitted was abnormally high in blood sugar—an indication of diabetes. Four of the mail order laboratories, reporting on the same specimen, said it was normal. Possible diabetes was undetected. The reports of 71 per cent of the mail order labs performing the test varied from the range of control lab reports by from 20 to 104 per cent. Dr. Schaeffer.

DR. SCHAEFFER: By medical standards, a variance of over 10 per cent in this test is unacceptable. Of course, the significance of not detecting diabetes is clear. But if it is detected the amount of insulin given a patient is determined by the amount of sugar in his blood. If the lab report is inaccurate on the low side he may not get a sufficient amount of insulin to help him. If the lab report is inaccurate on the high side, he may get too much insulin— and an overdose could put him into shock or kill him.

McMULLEN: On the two remaining tests—complete blood count and urinalysis—our medical experts agreed that the reports of the mail order laboratories showed a "disturbing variation" from the reports of the hospital control laboratories. They concluded that some serious medical conditions could therefore have been overlooked. The final results of our experiment: 88 per cent of the 17 mail order laboratories tested were wrong on one or more of the tests they undertook. Since our experiment did not include mail order laboratories operating in New York City, we decided to send the test for identification of a disease-causing Salmonella to five mail order laboratories operating in the New York area. Again two of our control labs agreed that the bacterial specimen was a Salmonella, Group D—which includes an organism that causes typhoid fever. But a third control—not previously utilized—failed to identify this, as did 100 per cent of the mail order laboratories in the New York area. How typical are these results? We don't know, but a sick patient may get only one chance to find out.

CRONKITE: And, Jay McMullen, we'd like to underscore that the labs in question are all mail order laboratories, not the community laboratories that do the bulk of the nation's medical testing. Tomorrow night the second part of Jay McMullen's report—a close look at one mail order laboratory that failed the same test 12 times.

II.

CBS NEWS FACT FINDING REPORT

Television Broadcast of June 23, 1965

CRONKITE: Last night, we presented the first in a series of reports on mail order medical labora-

tories. Our report indicated widespread error among the mail order labs checked by the CBS News Fact Finding Unit. Eighty-eight per cent of those labs were wrong on one or more of the tests they undertook, tests that could involve life or death. That first report involved many laboratories testing actual medical specimens. But tonight's report involves only one lab. And the specimens it received were highly unusual. The reasons are explained by Jay McMullen.

McMULLEN: During our investigation of mail order laboratories, one of our cooperating physicians obtained some literature from an organization called Nutritional Research Associates. This literature offered to do a laboratory test called a Urine Hormone Assay for a price that surprised Dr. Alfred Kogon of Baltimore, Md.

DR. KOGON: The literature itself stated that most laboratories would charge between $95 and $125 for these tests. Yet, Nutritional Research Associates offered to perform them routinely for only $15 and, as a special introductory offer for the physician and his family, at only $5 each. I was curious to know how Nutritional Research Associates could perform these tests at so low a price.

McMULLEN: We found that Nutritional Research Associates, Inc., is located in this house in Cedar Rapids, Iowa. It is incorporated as a non-profit corporation "to provide laboratory facilities for its members to do research on nutritional deficiency and efficiency." Nutritional Research Associates sent the following instructions to Dr. Kogon.

DR. KOGON: Instructions of Nutritional Research Associates were that the check in payment for

the hormone assay on urine was to be sent to them at Cedar Rapids, Iowa, but the urine specimen itself was to be placed in a small plastic bottle, then into a mailing carton they themselves supplied and sent directly to Science Laboratories in Flagstaff, Ariz.

McMULLEN: In Flagstaff, Ariz., we had some difficulty in locating Science Laboratories. Its address is a post office box assigned to a Mr. Robert Bernard Holmes. The Flagstaff telephone directory does not list a Robert B. Holmes or Science Laboratories. But, we found that this house is owned by a Robert Bernard Holmes. Mr. Holmes—shown here—has said he has a degree as a medical technologist. He also has an office in Flagstaff in this building at 13 North San Francisco Street. On the door we found the words: "Science Laboratories—Research only."

DR. KOGON: All that Science Laboratories required was a morning urine collection—enough to fill this small bottle. This also surprised me because the standard procedure in hormone assay tests requires a complete 24-hour urine collection which is necessary to measure the daily hormone output. Therefore, the procedure of Science Laboratories seemed highly unorthodox, to put it mildly.

McMullen: Because there were doubts, we decided to test Science Laboratories. At our request, cooperating physicians in California, Massachusetts, Virginia and New York wrote to Nutritional Research Associates and also received in reply N.R.A.'s literature and hormone kits. In New York, the Bureau of Laboratories, New York City Health Department, prepared, at our request, a solution containing distilled water, colored yellow, to simulate human urine. Could Science Laboratories find any hormones in

this? Dr. Morris Schaeffer, Director, New York City Bureau of Laboratories.

DR. SCHAEFFER: A proper assay of the solution we prepared could not possibly find any hormones or anything related to them.

McMULLEN: The 12 specimen bottles received by our cooperating physicians were filled with the colored water solution prepared by the Bureau of Laboratories. The bottles were repackaged in the cartons provided and mailed by our cooperating physicians to Science Laboratories, Flagstaff, Ariz. Each doctor rereceived back a test report from Nutritional Research Associates. These reports were examined by Dr. Schaeffer, Director, New York City Bureau of Laboratories.

DR. SCHAEFFER: These reports are amazing. They all show sizeable amounts of hormones in seven different categories. You would expect to find such hormones in an assay of a genuine sample of urine—but not in an assay of colored water. Beyond that, the specimens sent by the different physicians were all part of the same colored water solution. Yet no two of these reports are alike—except that they all report low metabolic function in the patients and recommend nutritional supplements.

McMULLEN: After receiving his report, Dr. Alfred Kogon of Baltimore got a letter.

DR. KOGON: Several days later I received a letter from a man in Virginia who said he was a regional representative of an organization called Professional Foods. He said he had received a copy of the hormone assay from Nutritional Research Associates which had suggested a need of nutritional sup-

plements. He enclosed an order blank and a price list for a number of nutritional supplements sold by his organization, Professional Foods.

McMULLEN: We found that Professional Foods wholesales health foods and vitamins and has sales representatives in various cities throughout the United States. Its main office is in Cedar Rapids, Iowa —in this same building occupied by Nutritional Research Associates. The President of Nutritional Research Associates, Samuel C. Fulkerson, is also listed as the owner of Professional Foods. District salesmen for Professional Foods, after being notified by Nutritional Research Associates, now have contacted each of our cooperating physicians who sent a solution containing colored water to Science Laboratories. These are some of the nutritional supplements offered for sale by Professional Foods. They were offered as a treatment for the nutritional deficiencies found by Science Laboratories in our solution containing distilled water, colored yellow.

CRONKITE: A representative of Science Laboratories has said that his laboratory services 8,000 doctors. We do not know to what extent the doctors, Nutritional Research Associates, Professional Foods or their representatives are aware of what occurs in Science Laboratories in Flagstaff, Ariz. Today, the fact finding unit sent a specimen of the colored water solution and data on its investigation to interested authorities in Washington, D. C. . . . And how do the mail order labs themselves react to the findings of the CBS Fact Finding Unit? A laboratory spokesman replies on this program tomorrow night.

III

CBS NEWS FACT FINDING REPORT

Television Broadcast of June 24, 1965

CBS NEWS RADIO BROADCAST of June 24, 1965. (As shown by the News Release of June 25, 1965, appearing in the record.)

Following is the text of the report on mail order laboratories, stemming from the CBS News Fact Finding Unit's investigation of the accuracy of the testing of medical specimens by mail order laboratories, as broadcast last night (Thursday) on CBS EVENING NEWS WITH WALTER CRONKITE (6:30-7:00 PM, EDT, in some areas; 7:00-7:30 PM, EDT, in other areas) on the CBS Television Network and on "The World Tonight" (8:00-8:15 PM EDT) on the CBS Radio Network. The newsmen, in addition to Mr. Cronkite, were CBS News Correspondents Paul Niven, Wells Church and Dave Dugan, and reporter Bob Nelson, of Station WMT-TV, CBS Television Network affiliate in Cedar Rapids, Iowa.

CRONKITE: Last night, on this program, we presented a medical mystery story, the story of 12 samples of distilled water, colored yellow, submitted to a mail order medical laboratory. It was asked to perform a hormone test which is normally conducted on specimens of human urine. The results were surprising. The New York City Bureau of Laboratories, which prepared the colored water specimens, said it would be impossible to find any hormones in that water. Yet the mail order lab returned reports showing sizeable amounts of hormones in the samples submitted. That mystery story was part of a series on mail order laboratories, prepared by Jay McMullen and

the CBS News Fact Finding Unit. And today, the case of the colored water attracted attention in Washton. Comment now from the Chief Postal Inspector, Henry Montague, and the Commissioner of the Food and Drug Administration, George Larrick.

MONTAGUE: We saw Mr. Cronkite's programs the last two evenings. In fact, we had one of our inspectors, who specializes in medical fraud investigation, in New York yesterday to talk to the CBS people, and he is back there again today. This morning we received from the program, from CBS News, a letter which also contained a sample of the package which had been sent through the mails. We intend to make an investigation.

NIVEN: Do you share jurisdiction in this type of case with the Food and Drug Administration?

MONTAGUE: Today I contacted the office of the Commissioner of Food and Drug to determine whether they feel that they might have concurrent jurisdiction. At the moment that is not certain, but in any event, we have made arrangements to coordinate our investigation with their office so that if there is joint jurisdiction we will handle it jointly.

LARRICK: We think it is a very serious situation if a sick person is being diagnosed and the work upon which his treatment will be predicated is not well done and is not accurate. As a matter of fact, we've worked with your associate Mr. McMullen in some of these fields.

CHURCH: In other words, this is not a new operation with you?

LARRICK: No, it is not a new operation.

CHURCH: Has your staff already worked on this, in addition to the work with Jay?

LARRICK: Yes, we have tried to keep in touch with this field. Our clear authority to deal with it is when the diagnosis is accompanied, in one way or another, by the shipment of medicine or a theraputic device or something in interstate commerce that gives us clear jurisdiction. And we have investigated some of the firms to which Mr. Jay McMullen refers and are continuing our investigation. I have not been briefed on our most recent investigation in this field which is going on now and which is being stimulated by Mr. McMullen's investigation. And we will, when we conclude the study of that investigation, then reach a conclusion about whether we should recommend additional legislation.

CRONKITE: As you may recall, the case of the colored water involved three firms. The first was a firm in Cedar Rapids, Iowa—Nutritional Research Associates—which advertised the hormone test for urine. Doctors who respond were advised to send the samples directly to Science Laboratories in Flagstaff, Ariz. Shortly after receiving the hormone reports, the doctors were contacted by another firm—Professional Foods—which offered to sell nutritional supplements as a treatment for deficiencies indicated by the hormone test. Professional Foods had the same Cedar Rapids address as Nutritional Research Associates. In the interest of fairness, CBS News tried to obtain reaction from the firms involved. In Flagstaff, Ariz., the operator of Science Laboratories, Robert Bernard Holmes, was interviewed last night. But today, he asked that the interview not be used. In Cedar Rapids, we contacted Samuel Fulkerson, the president of

Nutritional Research Associates, who is also listed as owner of Professional Foods. Last night, he turned down a request for an interview by CBS News. But today, he consented to an interview with Bob Nelson of Station WMT-TV, a CBS affiliate.

BOB NELSON: What's your first impression of the CBS News report of last night?

FULKERSON: This is something I don't even want to talk about for the simple reason it is a . . . not a statement that has proper background in any area. It is subterfuge, insinuation and so forth.

BOB NELSON: Is your firm, Professional Foods . . . have they done anything wrong?

FULKERSON: Not one bit and of course, in the original statement, they didn't say anything about us doing wrong. They just put us in with the guy that they think they have found in the wrong.

BOB NELSON: Can you understand how it would be possible for the Science Laboratories in Flagstaff, Ariz., to mistake this colored water or something, or what's your opinion on what happened here?

FULKERSON: I don't know . . . I refuse to make a statement because I don't know. I've known the man for 15 years and I've never known him to do anything . . . and I've been checking all the time myself. But what do you know? I've known people to make a mistake.

CRONKITE: Fulkerson insisted his firm had done nothing wrong and he said his company has no direct connection with Science Laboratories. The CBS News investigation of mail order medical laboratories has indicated that many firms submitted faulty reports on specimens. But this is not necessarily to

be considered an indictment of all laboratories that do business by mail. Many others insist their standards are high, and that mail order medical testing can be reliable. One man who advances that argument is Dr. Louis Winkelman, Medical Consultant of Kings County Research Laboratory in Brooklyn. He talked with Dave Dugan.

DUGAN: Dr. Winkelman, is it possible for certain tests that are sent through the mails to decompose, for the samples not to come through exactly the way they should be?

DR. WINKELMAN: That is possible. However, precautions can easily be taken and proper instructions can be given to the doctors who are going to submit their specimens through the mail so as to preserve the stability and the sterility of the specimens to be examined, especially in the six tests that were described by your office.

DUGAN: Why is it necessary to have a laboratory such as yours that the specimens are sent in by mail? Aren't there enough local laboratories around the country?

DR. WINKELMAN: The value of performing laboratory tests through the mail is going to increase in the future. There are many tests that are being done now that are simply beyond the realm of a small, local laboratory. And in order to give service to many doctors throughout the country in small communities where the local laboratory may not be able to perform unusual tests, for him to have a method to send his test through the mail to recognized laboratories so that these tests can be done for his patients.

DUGAN: Do you feel that laboratories that do

their business through the mail have gotten a bad reputation?

DR. WINKELMAN: Very strongly so. The condemnation has been in the last two days on Mr. Cronkite's program that the inaccuracy of these results has been due to the fact that the specimens were submitted by the mail. I maintain that tests of specimens submitted by the mail are and can be performed accurately. If accurate (sic) results were found in these laboratories listed in the last two days, it was not due to the fact that it was submitted by the mail. The error is due to the laboratory itself.

CRONKITE: Our problem, as Jay McMullen pointed out originally, is that many mail order laboratories operate virtually without Government supervision; laws vary widely from state to state, and the quality of laboratory analysis can vary just as widely.

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In the Supreme Court
of the United States

OCTOBER TERM, 1968

No. 1038

UNITED MEDICAL LABORATORIES, INC., an Oregon corporation,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., a New York corporation, WALTER CRONKITE and JAY McMULLEN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition to Petition for a Writ of Certiorari

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OPINIONS BELOW

The opinions of the Oregon District Court are reported at 258 F. Supp. 735 (1966) (see also Appendix A to Petition, pp. 13-37).

The opinion of the Court of Appeals is reported at 404 F.2d 706 (1968) (see also Appendix B to Petition, pp. 38-68).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at page 2.

CONSTITUTIONAL PROVISIONS

The relevant provisions of the United States Constitution are set forth in the Petition at page 3.

STATEMENT OF THE CASE

Petitioner in its Statement of the Case (pp. 4-6) conveys the impression that the Court of Appeals decided that the publications in question were defamatory of it but that no recovery was available because of the application of the *New York Times* case. The reason for the district court's dismissal of the complaint, as noted by the Court of Appeals, lay in the trial court's determination "that the defamation was without any such reference to United Labs, either class or special, as would enable it to maintain a libel action under Oregon Law." (App. B p. 40) The Court of Appeals merely held that although not mentioned in the publication, such reference to petitioner was possible and, therefore, this question, at least on the facts adduced by affidavit, was not subject to disposition "as a matter of law" or "on a summary basis." The statements were not, as intimated by petitioner (pp. 4-5), held to be actionable under Oregon law.

Petitioner's other statements insofar as they follow the language and reasoning of the opinions of the trial court (App. A) and the Court of Appeals (App. B) are basically correct.

ARGUMENT

Reasons for Denying the Writ

1. No Conflict Exists Between the Decision of the Court of Appeals With Respect to the Questions Presented on This Petition and the Already Settled Position of This Court on These Matters.

Although the petitioner and, indeed, the Court of Appeals have referred to the "public interest" rationale as an extension of the *New York Times* rule, the decision in reality is a correct and compelling application of the privilege consistent with the scope of the partial immunity[1] contemplated by this Court in its prior decisions. The decision rests upon the one unifying principle which has been explicit and implicit in all of this Court's decisions in this area—the public's interest in and the public's right to be informed about the subject matter of the communication. Also of relevance is the disagreement between the district court and the court of appeals as to whether or not the publications in question could be understood as referring to petitioner. This was raised to a constitutional consideration by this Court in the

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[1] The summary judgment record of this case reveals that petitioner has no proof of "actual malice" which might defease the privilege (App. B p. 50; App. A pp. 13, 28, 37).

New York Times case. When faced with a similar question of reference, this Court stated:

> ". . . the evidence was constitutionally insufficient to support a finding that the statements referred to respondent." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 292 (1964).

The decision of the court of appeals is in accord with the step by step approach heretofore undertaken by this Court in defining the scope of the privilege. In view of this, no one of these decisions to date can be considered as finally determining the elements necessary for application of the rule. Petitioner would have this Court restrict the constitutional protection to situations involving both a "matter of public interest" *and*, either a "public figure" or "persons with a practical ability to counterargue or respond considering the mode of the publication involved." (pp. 2, 3)* In support of its interpretation of the scope of the *New York Times* rule petitioner relies almost exclusively on this Court's opinion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). This Court has on many occasions clearly indicated that no such narrow interpretation of the constitutional privilege was intended.

This Court's frequent references to, and reliance upon, the "public interest" aspects of the communications held privileged are too numerous to fully enumerate here. From the inception of the privilege in

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* All page references are to the Petition for Writ of Certiorari and Appendices unless otherwise stated.

New York Times, it has been clear that the nucleus around which all of the cases orbited was the public interest or concern in the subject matter of the publication. Subsequent decisions have adopted this rationale by stating that protection of discussion of matters of public concern is, first, the basis for the decisions and, second, the key to determining the categories of plaintiffs that must overcome the privilege to recover. This was initially apparent from this Court's reference to the "like rule" of *Coleman* v. *Mac Lennan*, 78 Kan. 711, 98 P. 281 (1908):

> "'. . . This privilege extends to a great variety of subjects, and includes matters of public concern, public men and candidates for office.' 78 Kan., at 723, 98 P., at 285" *New York Times Co.* v. *Sullivan*, supra, at 281-82.

Professor Pedrick, in his comprehensive article on *New York Times*: *"Freedom of the Press and the Law of Libel: The Modern Revised Translation,"* 49 Cornell L.Q. 581, equates the scope of the constitutional privilege in *New York Times* with that of the fair comment privilege in the Restatement of Torts, Chapter 25, Section 606, which privilege applies generally to all discussion of "matters of public concern." Ibid. n. 43.

When given the opportunity in *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), this Court moved to establish that Pedrick's interpretation of the expansive scope of the privilege was correct. Justice Brennan in his opinion for the Court clearly defined the scope of the *New York Times* rule:

". . . [W]e reject any suggestion that our references in *New York Times*, 376 U.S., at 282, 283, n. 23, and *Garrison*, 379 U.S., at 74, to *Barr* v. *Matteo*, 360 U.S. 564, mean that we have tied the *New York Times* rule to the rule of official privilege. The public interests protected by the *New York Times* rule are interests in discussion, not retaliation, and our reference to *Barr* should be taken to mean no more than that the scope of the privilege is to be determined by reference to the functions it serves. See Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L. Q. 581, 590-591 (1964)." 383 U.S. at 84-85 n. 10.

It cannot be questioned that informing the public on such an inherently grave matter of public concern—"conditions allegedly capable of wide-spreadedly affecting public health" (App. B p. 48)—serves a function contemplated within the scope and protection of the privilege. Reference to the *Butts* decision alone will supply ample verification of respondents' position.

What is basic to that decision is this Court's recognition that it was "at the threshold of this new constitutional development," and that the "history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right." It noted that the Court's primary concern had been the determination of the "extent of the right and the surrounding safeguards necessary to give it 'breathing space' ", rather than " 'the real problem' of defining or delimiting the right itself." 388 U.S.,

at 148-49. It further states that "[t]he dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.' " Id. Further support for respondents' position is found in this Court's other language in *Butts*, that although this "right to communicate information of public interest is not 'unconditional' ", *New York Times* has explicitly circumscribed the permissible sanctions. Id., at 150. Moreover, the Court specifically notes that its reasoning does not affect any "libel or other tort actions not involving public figures *or* matters of public interest." (Emphasis supplied) Id., at 155 n. 19.

Quoting from Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), petitioner complains that the court below disregarded certain "factors" such as the claim that ". . . plaintiff did not thrust itself into the arena of debate as a public figure or to plaintiff's inability to adequately defend itself under the circumstances of this attack" (p. 9). In fact, the Court of Appeals considered the so-calied "limelight" argument and found that because of the nature and extent of petitioner's capacity to affect health, its activities were ". . . as naturally entitled to public gaze and interest, and as inherently subject to the right of public information and discussion, as were the field and activity in *Butts* —or in *Walker* and *Pauling*" (App. B p. 49).

It is thus clear that not only is petitioner's interpretation of the scope of the *New York Times* doctrine incorrect, but so too is its understanding of the thrust of the *Butts* decision. Wally Butts and General Walker were subject to the limitations imposed by *New York Times* because the public had a legitimate interest in their conduct.

In both cases, this Court noted that the "public figure" plaintiff had sufficient fame or notoriety prior to the alleged defamation to obtain access to the news media and thereby present public rebuttal. Certainly, the lack of such access would not seem to affect the public's legitimate interest in the individual's conduct and would, therefore, be constitutionally unimportant. Thus, the fact that *Butts* and *Walker* were presumed to have access to the media appears merely to have been an additional reason for, and not a prerequisite to the application of the *New York Times* standard of protection. Moreover, "The public interests protected by the *New York Times* rule are interests in discussion, not retaliation . . ." *Rosenblatt*, supra, at 84-85 n. 10.

Whatever might be the significance of an individual's economic ability or inability to purchase television or radio time to counter-argue against alleged defamatory statements, that question is not present in the case at bar. The record here shows that respondents gave television time to an industry spokesman, Dr. Winkelman, who insisted that mail order medical laboratory tests are and can be performed accurately (App. B pp. 67-68).

In addition, the precise argument made by petitioner (p. 11) as to the cost of replying is, in itself, a sufficient basis for disregarding access to the news media as a necessary condition. Such a condition ultimately suggests constitutionally unsupportable discrimination since the constitutional privilege would depend on the relative wealth of the individual defamed. The proposition that a rich man, able to purchase time on television or space in a newspaper, is less entitled than a poor man to legal protection of his reputation would violate the concept of equal protection guaranteed by the Fourteenth Amendment. This Court has not intended in its *New York Times* line of decisions to so delimit the scope of the privilege.

In a privacy action, public interest in the subject matter of the publication is sufficient as the sole basis for the privilege. See *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). There is no persuasive logical reason why an individual's interest in his reputation should receive more protection than his interest in his privacy. Indeed, the right of privacy would seem more substantial than reputational rights, having risen under certain circumstances to constitutional stature. See, e.g. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

The Court of Appeals, aware of the fact that this Court in *Time Inc.* v. *Hill*, supra, at pp. 390-91, warned against a "blind application of *New York Times Co.* v. *Sullivan*," undertook to apply "these

principles in (the) discrete context" of the legal and factual situation involved. This is in accord with this Court's normal policy of refusing "to formulate a rule of Constitutional Law broader than is required by the precise facts presented in the record" (See, *Garner* v. *Louisiana*, 368 U.S. 157, 163 (1961)), and its traditional reluctance in the area of freedom of speech and of the press as previously noted in the *Butts* decision to fully define and delimit the scope of the right. But this cannot be interpreted to mean that each new fact situation presented requires independent consideration and final adjudication by this Court. It was merely decided that because of the important constitutional protection involved and the Court's experiences in other areas of free speech, the rule should be allowed to evolve on a case by case basis, lest an initial definition of the scope prove insufficient or overreaching. The Court of Appeals analysis conforms in all respects with the intent and directives of this Court in its applicable decisions.

Neither is the *New York Times* privilege to be confined to "political discussion" as suggested by petitioner (p. 8). In that case this Court stated that the "constitutional safeguard" of freedom of expression upon public questions " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political *and social* changes desired by the people.' *Roth* v. *United States*, 354 U.S. 476, 484." (Emphasis Supplied), *New York Times Co.* v. *Sullivan*, supra, at 269. In applying the *New York Times* rule in *Butts* and *Walker*, this Court relied on the

phrase from *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940), used by the majority in the *Hill* case and by Justice Douglas in his concurring opinion in *Rosenblatt*, that freedom of discussion " 'must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period'." 388 U.S., at p. 147. These statements by this Court are sufficient to dispel petitioner's assertion that the *New York Times* rule is only operative in a governmental context. No such shallow interpretation of the needs of society is possible.

Petitioner misunderstands the rule adopted by the Court of Appeals. It claims that the decision gives the defamer "complete control over his own immunity, for it is his statement . . . that determines whether public interest is involved" (p. 7). Of course, the Court of Appeals is speaking of an objective public interest, independent of the publication in question. The public interest in human health hazards is and always has been constant and does not depend for its objective existence on respondents' publication. The privilege will, therefore, not be available against all private individuals as petitioner contends, but only those individuals intimately involved in a matter of legitimate public interest.

Since petitioner is concededly engaged in a "public business" (*St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968)), which respondents suggested might require "government supervision" (App. B p. 68), its

activities affecting public health obviously fall under the *New York Times* rule. Thus, the Court of Appeals has properly found the factual setting of this case to be within the ambit of the *New York Times* privilege.

Petitioner predicts that should this decision be "allowed to stand," the publication media will effectively be enabled to fully defame private persons "so long as a subject of public interest is chosen . . . as a mode of attack" (pp. 11, 12). No such choice is available to the publisher. Petitioner overlooks the requirement that the party defamed have a legitimate connection with the subject matter of the communication which is of interest to the public. The Court of Appeals' opinion does not sanction indiscriminate and unbridled attacks on the reputations of private individuals. Instead, it provides that only when such persons are involved in matters of public interest about which the public has a right to be informed will their right to recover be proscribed by the *New York Times* privilege.

Petitioner would have the protection afforded by the free speech and press guaranty of the First and Fourteenth Amendments vary with the "mode of publication" employed (p. 10). This Court has made it clear that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary," and that whatever the method of expression, the same rules apply. *Joseph Burstyn Inc.* v. *Wilson*, 343 U.S. 495, 502-503 (1952). This principle applies with equal force to television broadcasts. *St.*

Amant v. *Thompson*, 390 U.S. 727 (1968), *Farmers Union* v. *WDAY*, 360 U.S. 525 (1959). A federal constitutional rule distinguishing among the forms of expression as a basis for defining the scope of a privilege would be incredible, in light of the Court's mandate that the scope of the privilege is to be guided by "the functions it serves."

2. No Conflict Exists Between the Decision Rendered by the Ninth Circuit Court of Appeals in the Instant Case and the Decision of Any Other Court of Appeals on the Questions Presented in This Petition.

There can be no question that the Fifth Circuit Court of Appeals in *Time, Inc. d/b/a, "Life"* v. *McLaney*, — F.2d — (No. 25585, C.A. 5, January 3, 1969) is in full agreement with the Court of Appeals in the instant case as to the scope of the *New York Times* privilege. Indeed, that court specifically noted its accord with the Ninth Circuit opinion in the instant case.

The Court concluded:

> ". . . that the constitutional privilege extends to discussions by specific individuals, not associated with any government if those individuals are involved in matters of important public concern."

The public's concern in *McLaney* was with the gambling element's influence in the government. In fact, "the announced policy of the opposition to the present government was the elimination of racketeer gambling." *McLaney*, supra. Therefore, the subject matter of the publication — McLaney's activities in

connection with both the gamblers and the new government—and not his position as a public figure was "the proper subject of inquiry and of public interest," and the true basis for the application of *New York Times*. Consequently, the decision in *Belli* v. *Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (C.A. 5, 1967), cert. den. 393 U.S. 825, insofar as it discussed the scope of the *New York Times* rule, and if understood to be contrary to *McLaney*, can no longer be considered the position of the Fifth Circuit.

3. The Judgment for Respondents Can Be Sustained on Non-Federal Grounds.

The Oregon district court disposed of this diversity case under principles of Oregon substantive libel law (App. A pp. 22-28). The Court of Appeals believed, after reading the Oregon cases, that the lower court's conclusions as to the Oregon law of "class libel" ". . . accorded too narrow a scope to Oregon libel law . . ." (App. B p. 41).

Respondents respectfully submit that the Oregon district judge's determination of the local law was entitled to great weight, and that his evaluation of the controlling Oregon cases of *Blaser* v. *Krattiger*, 99 Or. 392, 195 P. 359 (1921), characterized as illustrative of "nonactionable class libel" in *Marr* v. *Putnam*, 196 Or. 1, 22-23, 246 P.2d 509 (1952), should have been left undisturbed by the Court of Appeals (cf. *Steele* v. *General Mills, Inc.*, 329 U.S. 433, 439 (1947)). Moreover, in upholding the district court's interpretation of the state law in a diversity case, rather than

that of the court of appeals, this Court in the *Steele* case concluded that to do otherwise would be unacceptable since it:

> ". . . would result in applying a rule of law in the federal courts different from the rule we believe has been applicable in the state courts." *Steele* v. *General Mills, Inc.*, supra, at 441.

If dismissal may be sustained on a non-federal ground, there can be no reason for the Court to consider this petition for certiorari. Under *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947), respondents may advance this argument without filing a cross-petition for certiorari.

CONCLUSION

Since the foregoing discussion makes obvious the lack of grounds for granting the writ of certiorari, the Court should deny the petition.

Respectfully submitted,

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